



1 granted a certificate of appealability and reviewed this Court's denial of the petition.  
2 The Ninth Circuit reversed and remanded. See Arnold v. Runnels, 421 F.3d 859, 869-870  
3 (9th Cir. 2005). On remand, the Ninth Circuit ordered this Court to issue a conditional  
4 writ of habeas corpus and require that the State of California release Petitioner from  
5 custody in this case, unless the State grants Petitioner a new trial within a reasonable  
6 period of time as determined by this Court. Id. On March 2, 2006, this Court issued an  
7 order conditionally granting the petition. The Court ordered that Petitioner must be  
8 released and his conviction vacated unless the State of California retries Petitioner within  
9 one-hundred and twenty (120) days. A copy of the Court's order was sent to the parties  
10 of record and sent by certified mail to the Alameda Superior Court.

11 On July 13, 2006, the Court ordered Respondent to show cause as to why this  
12 Court should not issue an unconditional order releasing Petitioner. The Court ordered  
13 Respondent to file a response and notify the Court of the current status of the underlying  
14 state criminal proceedings. On July 18, 2006, Petitioner, through his counsel, filed a  
15 response to the Court's Order to Show Cause and a declaration. On July 21, 2006,  
16 Respondent filed a response to the Order to Show Cause. On July 25, 2006, Petitioner  
17 filed a reply to Respondent's response.

## 18 DISCUSSION

19 The parties have fully addressed the status of the underlying state proceedings in  
20 the papers submitted as of the date of this order. On June 28, 2006, Petitioner appeared  
21 before the Alameda Superior Court and the prosecution noted that it was initiating  
22 criminal proceedings against Petitioner. Petitioner's Response, Decl. of Amitai Schwartz,  
23 Exhibit 3 at 1-3. The Alameda County Public Defender asked the superior court to  
24 continue the case for two days to determine whether the office would accept the case. Id.  
25 The superior court agreed, noting that it was ready to set the case for trial on Monday July  
26 3, 2006 and that there were judges available to try Petitioner's case. Id. at 3.

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On June 30, 2006, the Alameda Public Defender's Office accepted Petitioner's case and the superior court reiterated that trial proceedings could begin on Monday, July 3, 2006. Pet.'s Response, Decl. Of Amitai Schwartz, Exhibit 4 at 1. The public defender stated that Petitioner's counsel could not be ready by that date. Id. at 3-4. The superior court found that California's speedy trial statute began to run on that date, and it set further proceedings on July 6, 2006 and a trial date of August 7, 2006. Id. at 1, 4. On July 6, 2006, Petitioner's counsel requested a date for a motion to dismiss based upon the prosecution's alleged failure to comply with this Court's order. Pet.'s Response, Decl. Of Amitai Schwartz, Exhibit 5 at 2. The superior court set a motion hearing date for July 21, 2006, and noted the trial date was still on calendar for August 7, 2006. Id. at 2. In his Response to the Order to Show Cause, Respondent notes that the prosecution informed Respondent that Petitioner's counsel intends to continue the motion date for two weeks. See Resp't. Response at 3, n.4.

Habeas corpus is an equitable remedy, Schlup v. Delo, 513 U.S. 298, 319 (1995) and courts have "broad discretion in conditioning a judgment granting habeas relief." Hilton v. Braunskill, 481 U.S. 770, 775 (1987). "Indeed, 'federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.'" Gilmore v. Bertrand, 301 F.3d 581, 583 (7th Cir. 2002) citing to Hilton, 481 U.S. at 775.

Based upon the briefing, the Court concludes that Respondent has shown good cause for an extension of time beyond the Court's original one-hundred and twenty (120) day deadline for retrying Petitioner. Here, the state criminal proceedings were initiated against Petitioner well before the deadline. Petitioner's criminal proceeding is now subject to California's speedy trial statute pursuant to Cal. Penal Code §1382(a)(2). As the superior court noted, Petitioner's right to effective representation of defense counsel does not override this Court's order. Pet.'s Response, Decl. Of Amitai Schwartz, Exh. 4 at 4. This additional time period within which to retry Petitioner conforms with the Ninth Circuit's order on remand to issue a conditional writ of habeas corpus and require that the

1 State of California release Petitioner from custody in this case, unless it grants Petitioner  
 2 a new trial within a *reasonable* period of time as determined by this Court. Arnold v.  
 3 Runnels, 421 F.3d at 869-870 (emphasis added). See also Gilmore, 301 F.3d at 583  
 4 (district court had authority to grant the state an extension of time to comply with  
 5 conditional writ); Moore v. Zant, 972 F. 2nd 318, 319, 320-21 (11th Cir. 1992) (district  
 6 court did not err in granting state additional time to resentence petitioner after state failed  
 7 to act within original 180 day time period). Accordingly, the Court grants Respondent an  
 8 extension of time to retry Petitioner within a reasonable period of time, subject to  
 9 California's speedy trial act, and providing that petitioner's choice to waive time, if  
 10 necessary for preparation of the defense, shall not affect the reasonableness of the time  
 11 period.

### 12 DISPOSITION

13 For the reasons stated above, Petitioner must be released and his conviction  
 14 VACATED unless the State of California retries Petitioner within a reasonable time  
 15 period. The underlying trial proceedings shall commence within **sixty days** of the date of  
 16 this order, subject to the conditions set forth above. The Clerk of Court shall send a copy  
 17 of this order to the Alameda Superior Court via certified mail.

18 IT IS SO ORDERED.

19 DATED: 8/3/06

/S/ \_\_\_\_\_

20 JEREMY FOGEL  
 21 United States District Judge

1 A copy of this ruling was mailed to the following:

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8 Clerk, Alameda County Superior Court  
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